NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN** IA PART 27
Justice

WAFAA ENNASSIH,	Index No. 707804/14
Plaintiff,	Motion Date November 21, 2016
- against-	
NEW YORK CITY TRANSIT AUTHORITY, and METROPOLITAN TRANSPORTATION AUTHORITY,	Motion Cal. No. 42 & 44
Defendants.	Motion Seq. No. 2 & 4

The following papers numbered 11 to 27 and 53 to 78 read on these separate motions by plaintiff, pursuant to 22 NYCRR § 202.21, to vacate plaintiff's note of issue previously filed with the court on July 15, 2016, to permit the completion of material and relevant discovery proceedings in this matter; pursuant to CPLR 3124 and 3126, to direct defendant, New York City Transit Authority (NYCTA), to produce the Station Supervisor that was on duty at the Lefferts Boulevard Station from 8:00 A.M. to 11:00 a.m., on January 4, 2014, for an examination before trial within 30 days, or such time as the court otherwise directs; pursuant to CPLR 3124 and 3126, to direct defendant, NYCTA, to produce "J. Holly," the New York City Transit Authority Cleaner (CTA), that was on duty at the Lefferts Boulevard Station from 8:00 a.m. to 11:00 a.m., on January 4, 2014, for an examination before trial within 30 days, or such time as the court otherwise directs; pursuant to CPLR 3124 and 3126, to direct defendant, NYCTA, to provide all "Supervisory Log Station Inspection Reports" for the Lefferts Boulevard Station from 11:00 a.m., on January 2, 2014, through and including 11:39 a.m., on January 4, 2014; and to set this matter down for a conference before this court so as to set forth dates for the parties to complete the balance of outstanding discovery in this matter, and by defendants for summary judgment in their favor on the grounds that they have no liability herein and/or had no notice, constructive or actual, of any defect which is alleged to have caused plaintiff to fall.

	Papers Numbered
Notice of Motion - Affirmation - Exhibits.....	11-24; 53-65
Affirmation in Opposition - Exhibits.....	26-27; 66-77
Reply Affirmation.....	25; 78

Upon the foregoing papers, it is ordered that the motions are consolidated and determined as follows:

Plaintiff commenced this action to recover damages for personal injuries allegedly sustained on January 4, 2014, at approximately 11:00 a.m., when she slipped and fell on an ice and snow covered stairway as she descended from the elevated Lefferts Boulevard subway station in Queens, New York. Plaintiff testified that the weather that day was cold and clear with no snow falling, but that there was a lot of snow on the ground. Plaintiff also testified that since there were black garbage bags going down the left side of the stairway, she walked down the right side, holding onto the handrail. Plaintiff described the stairs as wet and covered with a thin coating of snow and ice. According to plaintiff, on the second to last step from the bottom, her right foot slipped on ice and she landed on her left foot, fracturing her ankle.

Laruah Latchman, who was employed as a station supervisor by defendants, NYCTA and MTA, testified on their behalf. Laruah Latchman testified that on the date of the accident the Lefferts Boulevard Station was one of the subway stations to which she was assigned, but that she did not arrive at that station until 11:40 a.m., after the time of the subject accident. Laruah Latchman also testified that maintenance at the Lefferts Boulevard Station, including snow and ice removal, would be performed by Transit Authority cleaners also known as CTAs. She further testified that these cleaners generally worked eight hour shifts, and that there is always a cleaner on duty at the Lefferts Boulevard Station 24 hours a day.

Plaintiff now moves for, among other relief, to strike the note of issue and to compel certain discovery. Defendants, NYCTA and MTA, separately move for summary judgment in their favor dismissing plaintiff's complaint as against them.

Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact. (*See Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223 [1978].) The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law by tendering proof in admissible form sufficient to demonstrate the absence of any material issues of fact. (*See Alvarez v Prospect Hosp*., 68 NY2d 320 [1986]). The movant's burden on a summary judgment motion is a heavy one, as a court must view the evidence in the light most favorable to the nonmoving party, and all inferences must be resolved in favor of the nonmoving party. (*See William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470 [2013].) If the initial burden is met, the party opposing summary judgment must produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. However, if the movant fails to make a prima facie case, summary judgment must be denied, regardless of the sufficiency of the opposing papers. (*See Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985].)

A real property owner or a party in possession or control of real property will be held liable for injuries sustained in a slip-and-fall accident involving snow and ice on its property

only when it created the alleged dangerous condition or had actual or constructive notice of its existence. (*See Dhu v New York City Hous. Auth.*, 119 AD3d 728 [2d Dept 2014]; *see also Denardo v Ziatyk*, 95 AD3d 929 [2d Dept 2012].) Thus, a defendant who moves for summary judgment in a slip-and-fall case has the initial burden of making a *prima facie* showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it. (*See Santoliquido v Roman Catholic Church of the Holy Name of Jesus*, 37 AD3d 815 [2d Dept 2007].) To meet its initial burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell. (*See Oliveri v Vassar Bros. Hosp.*, 95 AD3d 973 [2d Dept 2012]; *see also Mei Xiao Guo v Quong Big Realty Corp.*, 81 AD3d 610 [2d Dept 2011].)

"Under the so-called 'storm in progress' rule, a property owner will not be held responsible for accidents occurring as a result of the accumulation of snow and ice on its premises until an adequate period of time has passed following the cessation of the storm to allow the owner an opportunity to ameliorate the hazards caused by the storm." (*Marchese v Skenderi*, 51 AD3d 642, 642 [2d Dept 2008]; *see Anderson v Landmark at Eastview, Inc.*, 129 AD3d 750 [2d Dept 2015].) On a summary judgment motion, the question of whether a reasonable period of time has elapsed may be decided as a matter of law by the court based upon the circumstances of the case. (*See Valentine v City of New York*, 57 NY2d 932 [1982]; *see also Sie v Maimonides Med. Ctr.*, 106 AD3d 900 [2d Dept 2013].) While a lull in the storm does not impose a duty to remove the accumulation of snow or ice before the storm ceases in its entirety (*see Mazzella v City of New York*, 72 AD3d 755 [2d Dept 2010]), "if the storm has passed and precipitation has tailed off to such an extent that there is no longer any appreciable accumulation, then the rationale for continued delay abates, and commonsense would dictate that the rule not be applied." (*Id.* at 756 [internal quotation marks omitted]; *see Rabinowitz v Marcovecchio*, 119 AD3d 762 [2d Dept 2014].) Further, even if a storm is ongoing, once a property owner elects to remove snow, it must do so with reasonable care or it could be held liable for creating or exacerbating a natural hazard created by the storm. (*See Kantor v Leisure Glen Homeowners Assn., Inc.*, 95 AD3d 1177 [2d Dept 2012]; *Salvanti v Sunset Indus. Park Assoc.*, 27 AD3d 546 [2d Dept 2006].)

In this case, defendants failed to meet their initial burden of establishing their *prima facie* entitlement to judgment as a matter of law. Defendants seek summary judgment on the grounds that they did not create the alleged hazardous condition or have actual or constructive notice of its existence, and that they are not liable based on the "storm in progress" rule. In support of the motion, defendants submitted the parties' examinations before trial testimony and certified climatological data reports for the La Guardia Airport weather station in Queens, New York, pertaining to January 2014.

Defendants assert that they are not liable under the "storm in progress" since the subject accident occurred while it was still snowing or very shortly after it stopped. Plaintiff, however, testified that while there was snow on the ground, there was no snow falling on the subject date.

Moreover, nothing in the testimony of station supervisor, Laruah Latchman, disputes this testimony by plaintiff. The reports submitted by defendants also indicate that there was no snow fall on the subject date, and that the approximately seven inches of snow on the ground on that date were from 3.4 inches of snow which fell on January 2, 2014, and 4.5 inches of snow which fell on January 3, 2014. The reports further indicate that the "storm" had ended at approximately 6:00 a.m. on January 3, 2014, and only trace amounts had fallen thereafter, which stopped at 1:00 p.m. on January 3, 2014. Thus, contrary to the assertion of defendants, the "storm in progress" rule does not apply here since there was no snow fall on the subject date; the storm had ended a day earlier; and at the time of plaintiff's fall, there was not merely a "lull" in the storm.

Defendants also fail to make a *prima facie* showing that they did not create or have actual or constructive notice of the alleged hazardous condition which caused plaintiff to fall. Defendants have offered no evidence if or when the subject stairway was last inspected or cleaned. (*See Joachim v 1824 Church Ave., Inc.*, 12 AD3d 409 [2d Dept 2004].) There is also no evidence of what if any snow and ice removal was performed by defendants at the Lefferts Boulevard Station with regard to the snowfall of January 2, 2014, and January 3, 2014, on those dates, and on January 4, 2014, prior to the subject accident. For example, there is no testimony before this court by a representative of defendants who inspected the stairway before plaintiff's accident or who performed or oversaw any snow and ice removal at the subject premises. The testimony of station supervisor, Laruah Latchman, who was not at the Lefferts Boulevard Station until after plaintiff's accident, regarding the general practice of station cleaners to perform snow and ice removal at the station, is insufficient to establish that defendants did not create or have actual or constructive notice of the subject snow and ice condition that caused plaintiff's injuries. Mere reference to general cleaning practices, with no evidence regarding any specific cleaning or inspection of the area in question relative to the time when the plaintiff fell is insufficient to establish a lack of constructive notice. (*See Herman v Lifeplex, LLC*, 106 AD3d 1050 [2d Dept 2013].) Thus, defendants did not demonstrate their *prima facie* entitlement to judgment as a matter of law.

Since defendants failed to meet their initial burden on their motion for summary judgment, it is unnecessary to consider plaintiff's opposition papers.

Accordingly, the motion by defendants for summary judgment is denied.

The note of issue herein was filed by plaintiff on July 15, 2016, in order to comply with the compliance conference order dated November 2, 2015. In an affirmation filed together with the note of issue, plaintiff's counsel noted that discovery items remained outstanding, including a further deposition of defendants specifically of someone who has personal knowledge of the facts and circumstances of the matter. In an affirmation submitted in support of plaintiff's timely motion, plaintiff's counsel affirmed that his office tried, through several telephone calls to counsel for defendants to schedule said deposition, to no avail.

The branch of plaintiff's motion seeking to vacate the note of issue is denied, but discovery may continue as provided herein while the action remains on the calendar in order to complete the outstanding matters.

The branches of plaintiff's motion seeking to direct defendants to produce the station supervisor, as well as, employee, J. Holly, the cleaner (CTA), who were on duty at the Lefferts Boulevard Station on the morning of January 4, 2014, prior to the time of plaintiff's 11:00 a.m. fall, for examinations before trial are granted.

Plaintiff shall serve a copy of this order with notice of entry upon defendants within 20 days of entry and file proof thereof with the Clerk of Queens County.

The branch of plaintiff's motion seeking to direct defendants to provide all "Supervisory Log Station Inspection Reports" for the Lefferts Boulevard Station from 11:00 A.M. on January 2, 2014, through and including 11:39 a.m., on January 4, 2014, is granted to the extent that defendants shall provide a formal response to said demand within 14 days after service upon them of a copy of this order with notice of entry, and is otherwise denied.

The branch of plaintiff's motion seeking to set this matter down for a conference before this court so as to set forth dates for the parties to complete the balance of outstanding discovery in this matter, is denied.

A copy of this order is being faxed to the attorneys for the parties.

Dated: June 21, 2017

DARRELL L. GAVRIN, J.S.C.